No. 21109

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WENATCHEE THRIFTY DRUGS, INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
HAROLD B. ZANOFF,
Attorneys,

National Labor Relations Board.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE CASE

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent on November 15, 1965, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*). The Board's Decision and Order (R. 50-54)[1] is reported at 151

[1] References to the pleadings, decision and order of the Board and other papers reproduced as "Volume I, Pleadings,"

NLRB 752, and its Supplemental Decision and Order (R. 69-70) is reported at 155 NLRB No. 76.[2] This Court has jurisdiction under Section 10(e) of the Act, the unfair labor practices having occurred in Wenatchee, Washington.

I. The Board's Findings of Fact and Conclusions of Law

Briefly, the Board found that respondent violated Section 8(a)(5) and (1) of the Act by refusing, on and after July 26, 1963, to bargain with the authorized representative of its employees. The Board further found that respondent independently violated Section 8(a)(1) of the Act by threatening an employee concerning the adverse consequences of unionization. Furthermore, the Board, rejecting respondent's contention to the contrary, determined that respondent is engaged in commerce, and that the purposes of the Act will be effectuated by asserting jurisdiction over respondent's operations. The facts on

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are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." "G.C. Exh.," refers to exhibits of the General Counsel. Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

[2] In its original Decision and Order the Board rejected the Trial Examiner's original report which recommended dismissal of the complaint for jurisdictional reasons. In overruling the Examiner, the Board asserted jurisdiction, and remanded the case for preparation and issuance of a supplemental report, which the Board thereafter affirmed in its Supplemental Decision and Order. The issue concerning the Board's jurisdiction is discussed *infra*.

which the Board's conclusions are based are summarized below.

A. *The Board's jurisdiction: the nature of respondent's business*

Respondent operates a large drug store in Wenatchee, Washington, and, at the time material herein, employed 7 sales clerks, 2 pharmacists, 10 to 12 lunch counter employees and 1 office worker (R. 56; Tr. 74). The sales personnel perform various shelf stocking, sales, and cashier functions (R. 56; Tr. 79-80). The Union [3] conducted organizational activity among the sales personnel in July 1963 (R. 56; Tr. 66).

Respondent is a Washington corporation. Clarence Olberg and his wife, Irene Olberg, president and vice president respectively, jointly own 98 percent of the stock of the corporation. The remainder of the stock is owned by Ralph Purvis, the corporation's secretary-treasurer, and these three individuals comprise the board of directors (R. 50-51; Tr. 13-15). Gail Hayes is the manager of respondent (R. 51; Tr. 35-36). Respondent's gross sales for 1963 were $424,000 and its purchases from outside the State of Washington exceeded $30,000 (R. 50; Tr. 55-57).

Respondent is one store in a chain of five retail drug stores which Clarence Olberg and his associates operate in the State of Washington. The other four stores in the chain are owned by Thrifty Investment

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[3] Retail Store Employees Local 631, Retail Clerks International Association, AFL-CIO.

Co., Inc., d/b/a Thrifty Drugs,[4] and are located at Pasco, Kenewick, Richland, and Quincy, Washington (R. 51; Tr. 30-33). The officers of Thrifty Investment are Clarence Olberg, president, Gail Hayes, vice president and Ralph Purvis, secretary-treasurer.[5] These three individuals also constitute the board of directors (R. 51; Tr. 14-15). Olberg and Hayes each own 50 percent of the stock of Thrifty Investment. The annual gross sales of Thrifty Investment exceed $500,000 (R. 51; Tr. 57).

Clarence Olberg, in addition to being president of respondent and Thrifty Investment, is also president of Olberg Thrifty Drugs of Bremerton, Inc., d/b/a Thrifty Drug Stores of Washington,[6] which is a purchasing and payroll service organization located in Seattle, Washington (R. 51; Tr. 23, 26). President Clarence Olberg and Vice President Irene Olberg own 98 percent of the stock in this corporation. Ralph Purvis is secretary and Willis Rottman is treasurer. The board of directors consists of the Olbergs and Rottman (R. 51; Tr. 26).

The manager of the Wenatchee store, Gail Hayes, is compensated by salary and commission (R. 51; Tr. 35-36). Hayes has full authority to hire and discharge employees, set wage rates, and determine vacation periods and holidays (R. 51; Tr. 38). Hayes also prices the merchandise and arranges for advertising,

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[4] Herein referred to as Thrifty Investment.

[5] As indicated above, these are the same individuals who comprise the management of respondent.

[6] Herein referred to as Olberg Thrifty Drugs.

and has authority to determine labor policies, except when a "controversy" arises, in which case the situation is referred to Clarence Olberg for decision. This same managerial system is used in the four Thrifty Investment stores (R. 51; Tr. 38-39, 47-48). However, Hayes, who, as noted, owns 50 percent of the stock of Thrifty Investment, visits its four stores from time to time. His most frequent visits—about 10 a year—are to the store in Quincy, which is the closest to Wenatchee, about 30 miles distant (R. 52; Tr. 136-137). There is also interchange of employees between the Wenatchee and Quincy stores. Sales employees are exchanged, for example, at times of taking inventory, and pharmacists are exchanged during periods of vacation and illness. At other times employees are assigned interchangeably between the two stores "to give them more experience in other stores and to broaden their viewpoints" (R. 52; Tr. 48-50).

Olberg Thrifty Drugs collects advertising and purchasing data and handles payroll for the Wenatchee store, for the four Thrifty Investment stores, and for about 30 other retail food and drug stores (R. 52; Tr. 23-24, 40-41). Each store pays Olberg Thrifty Drugs a fee for services rendered (R. 52; Tr. 42). Respondent reimburses Olberg Thrifty Drugs for the amount of its payroll. Payroll checks are drawn on the account of Olberg Thrifty Drugs, but the Wenatchee store is designated at the bottom of the check (G.C. Exh. 10). Certain correspondence on behalf of respondent, including letters concerning the instant proceeding, originates in the office of Olberg Thrifty Drugs. The letterhead used carries the name "Thrif-

ty Drug Stores of Washington" and lists among others the Wenatchee, Pasco, Kenewick, Richland and Quincy stores in such a manner as to indicate that they are part of a single chain (R. 52; Tr. 22; G.C. Exhs. 9, 11).

On the foregoing facts, the Board found that respondent and Thrifty Investment constitute a "single employer." The Board further found that since the total gross revenue of the integrated enterprise exceeds $500,000 a year, and as respondent makes purchases of materials directly from outside the State valued in excess of $30,000, respondent is engaged in commerce and the purposes of the Act will be effectuated by asserting jurisdiction over respondent.

B. *The unfair labor practices*

On July 24, 1963, the Union possessed signed authorization cards from 5 of the 7 sales employees in respondent's store (R. 57; G.C. Exh. 13-A, 13-B). On that date, Paul Rickman, executive officer of the Union, wrote to respondent's manager, Gail Hayes, stating that the Union represented a majority of respondent's employees, and indicating that the Union wished to arrange for collective bargaining with respondent. Rickman requested to be advised whether Hayes had authority to represent respondent, and in the event he did not, asked who was responsible for this phase of the Company's operation (R. 56-57; G.C. Exh. 12). Enclosed with the Union's letter were photostatic copies of authorization cards signed by 5 of respondent's sales employees (G.C. Exh. 13-A, 13-B).

Receiving no answer to his letter, Union Agent Rickman wrote again to Manager Hayes on July 30, 1963, to complain about reports reaching him of "coercion, intimidation, and other acts by management to discourage Union membership" (R. 57; G.C. Exh. 14). Rickman again indicated the Union's desire to enter into negotiations with respondent (R. 59; G.C. Exh. 14). The union agent wrote again the following day, July 31, to say that he had heard that Manager Hayes was going on vacation as of August 1, and that the Union wanted an answer to its letter of July 24, and further, to commence bargaining (R. 57-58; G.C. Exh. 15). Respondent never replied to any of the Union's letters (R. 58).

About a week after receiving the first letter from the Union, Manager Hayes engaged employee Joanne Field in conversation and told her that if the Union came into the store "he would have to cut back his help" because he could not afford the wages the Union "would require." Hayes also told Field that he would have to lay her off, as well as employees Ollie Waite and Lena Hoggart, all three of whom had signed union authorization cards (R. 58; Tr. 85, G.C. Exh. 13-A, 13-B).[7] Field, who was pregnant, had previously been told by Hayes that she could continue

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[7] On the day he received the Union's first letter and the photostatic copies of the cards, Manager Hayes had summoned Field to his office, showed her the copies of the card, and told her that ". . . we would all be sorry that we joined the Union, that they didn't follow through on their promises . . . ." (R. 58; Tr. 84-86).

working as long as she was able to handle her job (R. 58; Tr. 86).

Upon the foregoing facts the Board found, in agreement with the Trial Examiner, that respondent violated Section 8(a)(5) and (1) of the Act by refusing on and after July 26, 1963, the approximate date of receipt of the Union's letter, to bargain with the Union as the exclusive representative of employees in an appropriate unit (R. 59). The Board further found that, by Manager Hayes' statement to Field that if the Union came into the store, he would terminate three employees including herself, respondent independently violated Section 8(a)(1) of the Act (R. 60).

II. The Board's Order

The Board's order requires respondent to cease and desist from refusing to recognize and bargain with the Union, from threatening employees with economic reprisal if they select a union, and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

Affirmatively, respondent is required to bargain with the Union as the exclusive representative of the employees in an appropriate unit, and to post the usual notice (R. 62-63).[8]

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[8] Since respondent did not except to the Trial Examiner's finding that it violated Section 8(a)(5) and (1) of the Act by failing to bargain collectively with the Union, the Board adopted this finding *pro forma* (R. 70). In view of re-

ARGUMENT

I. The Board Properly Asserted Jurisdiction Over Respondent's Business

A. *The existence of statutory jurisdiction is plain*

As the record shows (*supra*, p. 3), respondent, in the course of conducting its retail drug business, makes annual out-of-state purchases in excess of $30,000. The Board's statutory jurisdiction, therefore, is clear. The Act specifically states that the jurisdiction of the Board extends to any person ". . . engaging in any unfair labor practice . . . affecting commerce." [9] Moreover, once it is determined, as here, that interstate commerce would be adversely affected if the business immediately involved were disrupted as the result of a labor dispute, the Act applies regardless of the volume of commerce affected, provided it is more than "*de minimis.*" *N.L.R.B.* v. *Fainblatt*, 306 U.S. 601, 607. And see *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 684-685; *N.L.R.B.* v. *Reliance Fuel Oil Corp.*, 371

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sondent's failure to except to the Trial Examiner's finding, it may not now, in view of Section 10(e) of the Act, contest the propriety of the finding or the corresponding remedial provision of the Board order. See *N.L.R.B.* v. *Cheney California Lumber Co.*, 327 U.S. 385; *Marshall Field and Co.* v. *N.L.R.B.*, 318 U.S. 253; *N.L.R.B.* v. *Ochoa Fertilizer*, 368 U.S. 318; *N.L.R.B.* v. *Giustina Bros. Lumber Co.*, 253 F. 2d 371, 374-375 (C.A. 9); *N.L.R.B.* v. *Noroian*, 193 F. 2d 172, 173 (C.A. 9).

[9] Section 10(a), 29 U.S.C. Section 160(a), as those terms are defined by Section 2(6) and (7) of the Act, 29 U.S.C. Section 152(6) and (7).

U.S. 244; *N.L.R.B.* v. *Stoller*, 207 F. 2d 305, 307 (C.A. 9), cert. denied, 347 U.S. 919; *N.L.R.B.* v. *Townsend*, 185 F. 2d 378, 383 (C.A. 9), cert. denied, 341 U.S. 909. While no mathematical formula is available for determining exactly what is *de minimis*, it is well settled that "*de minimis* in the law has always been taken to mean trifles—matters of a few dollars of less." *N.L.R.B.* v. *Suburban Lumber Co.*, 121 F. 2d 829, 832 (C.A. 3), cert. denied, 314 U.S. 693. Accord: *N.L.R.B.* v. *Inglewood Park Cemetery Assn.*, 355 F. 2d 448, 450-451 (C.A. 9), cert. denied, 384 U.S. 951, ($3086.31 not *de minimis*); *N.L.R.B.* v. *Stoller*, *supra* ($12,000 not *de minimis*); *N.L.R.B.* v. *Aurora City Lines, Inc.*, 299 F. 2d 229, 231 (C.A. 7) ($2,000 not *de minimis*). As the cited cases indicate, there is no question but that the $30,000 respondent expends on out-of-state purchases is not *de minimis.*

Although the business activities of respondent, without question, have a sufficient impact on interstate commerce to involve the statutory jurisdiction of the Board, respondent still argues in effect that the Board has violated its own self-imposed jurisdictional standards. As the Court recently noted, however, in *N.L.R.B.* v. *Carroll-Naslund Disposal, Inc.*, 359 F. 2d 779, 780, "It is settled law that the extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's discretion; and it is not a matter for the courts, in the absence of extraordinary circumstances such as unjust discrimination." Citing, *N.L.R.B.* v. *Townsend*, 185 F. 2d 378, 383 (C.A. 9); *N.L.R.B.* v.

Stoller, supra, 207 F. 2d at 307 (C.A. 9); *N.L.R.B.* v. *Jones*, 245 F. 2d 388, 391 (C.A. 9). Also see *N.L.R.B.* v. *Carpenters Local Union 2133*, 356 F. 2d 464, 465 (C.A. 9). As we show below, such extraordinary circumstances did not exist here, and the Board's exercise of its discretion was in all respects reasonable.

B. *Respondent meets the Board's self-imposed jurisdictional standards*

The Board, as a matter of administrative policy, has established certain jurisdictional standards, expressed in terms of annual dollar minimums, to determine under what conditions it will assert its jurisdiction. The function served by these self-imposed standards is to conserve the Board's resources so that it may "concentrate its energies" on those cases having a significant impact on interstate commerce. *N.L.R.B.* v. *Jones, supra*, 245 F. 2d at 391 (C.A. 9); *N.L.R.B.* v. *F. M. Reeves & Sons, Inc.*, 273 F. 2d 710, 711 (C.A. 10), cert. denied, 366 U.S. 914.[10] Accordingly, the Board has held that it will assert jurisdiction over all retail enterprises which do a gross volume of business of at least $500,000 per annum. *Carolina Supplies & Cement Co.*, 122 NLRB 88, 89. The Board applies this standard to the total operations of an employer

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[10] The Board's discretionary standards received Congressional approval in 1959 under Section 14(c)(1) of the Act, wherein Congress provided that the Board might continue to decline jurisdiction over any labor dispute within its statutory jurisdiction, provided that it does not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the jurisdictional standards prevailing on August 1, 1959.

including all of the plants and locations where he conducts operations, even though only one facility is directly involved in the Board proceeding. *Ibid.; Siemons Mailing Service*, 122 NLRB 81, 84.

The Board, in asserting jurisdiction in this case, concluded that respondent and Thrifty Investment comprised a single integrated enterprise and thus should be treated as a "single employer" for jurisdictional purposes (R. 53). This conclusion accords with the Board's judicially approved practice of treating separately organized enterprises as one employer for jurisdictional purposes where it is found that their operations, although nominally separate, are highly integrated with respect to ownership and operation. See, e.g., *Sakrete of Northern California* v. *N.L.R.B.*, 332 F. 2d 902, 905 (C.A. 9), cert. denied, 379 U.S. 961; *A. M. Andrews Co. of Oregon* v. *N.L.R.B.*, 236 F. 2d 44, 45 (C.A. 9).

As the record in this case shows, respondent and Thrifty Investment have interlocking ownership and common management. Clarence Olberg is president of both corporations and Ralph Purvis is secretary-treasurer in both instances. Olberg's wife is vice president of respondent, while the vice president of Thrifty Investment is Gail Hayes, who is the manager of respondent. Advertising, purchasing and payroll services for both corporations are performed by a third corporation, Olberg Thrifty Drugs, which Clarence Olberg also heads, and in which his wife is vice president and Ralph Purvis is secretary.

Clarence Olberg plays an active role in the management of respondent, as he does in his other enterprises, and Gail Hayes performs certain managerial

functions with respect to the four stores owned by Thrifty Investment. Various other categories of employees are likewise interchanged among the five stores in the group. Finally, correspondence on behalf of all the stores that Clarence Olberg controls is conducted by him on stationery bearing the letterhead "Thrifty Drug Stores of Washington." The stores are listed on the letterhead, as the Board noted, "in such a manner as to indicate that they are part of a single chain" (R. 52).

As this Court said in *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, *supra*, 332 F. 2d at 907, "If there is overall control of critical matters at the policy level, the fact that there are variances in local management decisions will not defeat application of the 'single employer' principle." In short, the Board's determination to assert jurisdiction over respondent's operations fully comports with its long standing policy with respect to integrated enterprises. We submit, therefore, that the Board did not abuse its discretion in asserting jurisdiction over respondent. Since the combined sales of respondent and the four Thrifty Investment stores admittedly exceed $500,000, the Board's self-imposed standard for retail operations is clearly met.

II. Substantial Evidence on the Record as a Whole Supports the Board's finding That Respondent Violated Section 8(a)(1) of the Act by Threatening an Employee

As shown above, shortly after the Union secured authorization cards from 5 of the 7 employees in the unit and sent copies of the cards, along with a request

to bargain, to respondent, Manager Hayes told employee Field, who had signed a card, that "he would have to cut back his help" if the Union came into the store because he could not afford the wages that the Union "would require." Hayes then stated that the employees who would be laid off were Waite and Hoggart, both of whom had also signed authorization cards, as well as Field (R. 58; Tr. 85).

The Board found that this threat was made in violation of Section 8(a)(1) of the Act. It is well recognized that statements of this type, made during a union organizing campaign have a coercive effect on employees and inhibit them in the free exercise of their statutory rights. The Board's finding of unlawfulness, accordingly, was in all respects proper. *Carpinteria Lemon Ass'n.* v. *N.L.R.B.*, 240 F. 2d 554, 558 (C.A. 9); *N.L.R.B.* v. *V. C. Britton Co.*, 352 F. 2d 797, 798 (C.A. 9); *N.L.R.B.* v. *Kit Mfg. Co.*, 292 F. 2d 686, 688 (C.A. 9).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
HAROLD B. ZANOFF,
Attorneys,

National Labor Relations Board.

October 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective baraining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).
>
> * * * *

Prevention of Unfair Labor Practices

Sec. 10

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or trans-

acts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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